IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM-1978

No. 77-1084

FRANKLIN PIERCE BARBEE,
PETITIONER

V.

STATE OF NORTH CAROLINA
RESPONDENT

****

PETITION FOR WRIT OF CERTIORARI

****

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FRANKLIN PIERCE BARBEE,
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PETITION FOR WRIT OF CERTIORARI
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The Petitioner, Franklin Pierce Barbee, prays that a writ of certiorari issue to review the judgment made by the North Carolina Court of Appeals, entered October 11, 1977, affirming the decision of the Superior Court Division, General Court of Justice of Brunswick County, North Carolina, denying the Petitioner's motion at trial to suppress certain evidence, which judgment the Supreme Court of North Carolina refused to review on November 2, 1977, when it dismissed the appeal and denied discretionary review.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals, 34 N.C. App. 66, 237 SE2d 353 (1977) is appended to this Petition. The judgment of the Supreme Court of North Carolina dismissing the Petitioner's appeal and denying discretionary review N. C. (1977) is also appended to this Petition.

JURISDICTION

Judgment was entered against the Petitioner in the Superior Court of Brunswick County on September 10, 1976. The Petitioner's relief in North Carolina Courts was exhausted when his conviction was affirmed by the North Carolina Court of Appeals on October 11, 1977, and when the Supreme Court of North Carolina dismissed his appeal and denied discretionary review on November 2, 1977. The jurisdiction of the Court is invoked under 28 USCA 1257 (3).

QUESTION PRESENTED

Whether the trial court erred and violated the rights of the Petitioner under the 4th amendment to the United States Constitution by admitting into evidence, over the Petitioner's objections, matter seized and information gathered under an invalid search warrant and during an illegal search?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

On February 29, 1976, in response to information from an unnamed source, Officer Martin Folding of the Brunswick County Sheriff's Department went to a store owned and operated by the Petitioner, Franklin Pierce Barbee. The officer approached the store from the rear through a bay approximately 75 yards long and saw two suitcases sitting in a deep niche in the rear wall of the building. Upon arriving at the rear wall of the building, Folding found that one of the suitcases was slightly open, revealing that the contents consisted of several bundles wrapped in white non-transparent plastic. Reaching through the plane formed by the exterior of the rear wall of the building, Officer Folding opened one of the wrapped bundles and found it to contain green vegetable matter. At the time, no search warrant for the premises had yet been issued.

Following his discovery, Officer Folding left two fellow officers to maintain surveillance and went to the courthouse in Southport, where he obtained a search warrant, probable cause for which was based partially upon his observations made during his recent visit to the store. Folding and other officers then returned to the store and seized the two suitcases, which were later found to contain a large quanity of marijuana.

Franklin Pierce Barbee was later tried in Brunswick County Superior Court, the Honorable Henry A. McKinnon presiding, and found guilty of possession of more than one ounce of marijuana. The two suitcases which had been found in the niche in the rear wall and their contents were admitted into evidence over the objections of defense counsel.

ARGUMENT

It is the appellant's contention that, by his actions prior to the issuance of the search warrant, Officer Folding had violated the rights of the Defendant under the Fourth Amendment to the United States Constitution as made applicable to the States by the 14th Amendment. The appellant further contends that, as evidence produced by those activities formed a vital part of the affidavit submitted to the magistrate in support of the request for the issuance of the search warrant, the resulting search warrant was invalid and all evidence seized under its authority should have been excluded from the eventual trial.

In US v. Brown and Jones 487 F. 2d. 208 (4th Cir. 1973), the defendant appealed a conviction in Federal District Court for the middle district of North Carolina for possession of non tax paid spirits on the ground that ATF agents had obtained their search warrants by going to the defendants' barn, standing a

few feet outside it and detecting the odor of fermenting mash. Whereupon, the agents obtained a search warrant for the very barn outside of which they had just been standing. The Court upheld this method of investigation under the "open fields doctrine" of Hester v. U. S., 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1925) because the investigating officers "in neither instance entered into the barn itself, nor attempted to look inside to confirm (their) suspicions."

In the present case, the officer was not so restrained. His actions did parallel those of the ATF agents in the above case to the extent that he approached a building and detected the odor of the suspected substance while outside the building. However, his testimony indicates that he did, in fact, enter the building by reaching through the hole in the wall and did, in fact, look not only into the building, but into the suitcase and, after opening the plastic wrappings, into the wrapped parcels contained in the suitcase. Clearly, this is precisely the sort of conduct which, had it occurred in US V. Brown and Jones, suprea, would have lead the Fourth Circuit Court of Appeals, by the words of its own decision, to exactly the opposite holding.

In US v. Bradshaw, 490 F. 2d 1097 (4th Cir. 1974), the Court reversed the conviction of the defendant in Federal

District Court for the Western District of North Carolina, based upon evidence seized during a warrantless search. Two Federal Agents went to the front door of the defendant's house to question him concerning an abandoned auto on the road nearby. Having received no response from knocking on the front door, they were on the way to the back door when they noticed the odor of moonshine whiskey emanating from a truck parked beside the house. One agent went to the back of the truck and peered through the crack between the two doors which formed the rear side of the enclosed truck bed. Through this crack the agent was able to discern jugs of whiskey which he, upon pulling open the doors to the truck bed, seized. The Court held that this search was unreasonable and in violation of the defendant's fourth amendment rights because it clearly failed to meet the criteria of Collidge v. New Hampshire, 403 US 443, 29 L. Ed. 2d 564 91 S. Ct. 2022 (1971). The Coolidge holding states that in order for the search to be upheld under the plain view doctrine, the officer's presence at the vantage point from which he discovers the evidence must not amount to an unjustifiable intrusion into an area with respect to which the defendant's expectations of privacy are protected by the 4th Amendment, and that the officer's plain view must be inadvertant. The Court in Bradshaw held that the officer had not "discovered" the whiskey until the moment at which he saw it through

the crack between the doors, and that when he "took special pains" to peer through that crack, the officer exceeded the scope of his original justifiable intrusion and invaded the sphere of privacy guaranteed by the fourth amendment. The Bradshaw Court saw no need to reach the question of inadvertance.

While the inadvertance test under Coolidge has been the source of some controversy, State vs. Rigsbee 285 N.C. 708 (1974), it is still cited as a requirement for application of the plain view doctrine. See US v. Ross 527 F. 2d 984 (4th Circ. 1975).

In Fankboner v. Robinson, 391 F. Supp 542 (W D Va 1975), (rev'd per curiam apparently on other grounds, 538 F 2d 324), the Court did reach the second criteria of Coolidge and held the search and seizure invalid for lack of inadvertance. The officer in question had received a tip from an informant that the defendant was in possession of a shotgun and went to the defendant's apartment for the sole purpose of getting a plain view of the gun. The Court held that such conduct clearly violated the second part of the Coolidge test.

Clearly, the conduct of the officer in the present case was unacceptable under both the Bradshaw and Fankboner holdings. Unlike the ATF agents in Brown and Jones he did not stop upon

smelling the substance, but, instead, proceeded to the hole in the rear wall of the store, looked and reached inside the suitcase to remove one of the white non-transparent plastic bags, which he opened and the contents of which he examined. As in Bradshaw, supra, the officer's actions cannot be justified under the plain view doctrine as stated in Coolidge, supra. In his testimony, the officer states that "it's a type of bay situation where about, I guess, seven to ten feet back from the building it drops off into a bay." Later in his testimony, Officer Folding stated, "When I got to the top of the hill, I looked in it and observed several white plastic bags." At that point in his search, the officer was within ten feet of the rear wall of the building; prior to that point in his approach, he could not see the plastic bags:

> Q. There was no bags or no green vegetable matter or controlled substance in view there as you approached the building?
>
> A. To the sight, no sir.

Here the officer has plainly failed to meet the Coolidge standard of justifiable intrusion. In Bradshaw, the Court held that the ATF agents' original intrusion upon the premises of the defendant was justified by their wish to question him concerning an automobile abandoned nearby. However, in this case

at bar, the officer's reason for intruding upon the defendant's premises is not in dispute; he was conducting a search.

> A. I went there to confirm his (the informant's) information, to see what I could see at that time, yes, sir.

In addition, the officer's presence and plain view of the white plastic bags were hardly inadvertant. Rather, just as did the officer in Fankboner supra, Officer Folding was attempting to get a look at the subject matter of his informant's tip. Thus, under the two-pronged test in Coolidge, supra, the officer's observation of the white plastic bags and their contents cannot be justified under the plain view doctrine.

Perhaps the case most nearly on point with the one at bar would be People of the State of California v. Hurst 325 F 2d 891 (9th Circ. 1963, rev'd on other grounds 381 US 760, 14 L Ed. 2d 713, 85 S. Ct. 1976.) There, in response to an anonymous tip received over the telephone the police surrounded a house under which, they had been told, they would find two pounds of marijuana. One of the officers noticed that the screen had been removed from a small (8"x12") vent hole beneath a bedroom window and that about 6 inches inside that hole he could see a large brown package. The package contained two paper bags covering two plastic bags

covering a pillowcase. The officer removed the package and, reaching into it, was able to feel a "leafy material" through the pillowcase. The Court held that the plain view doctrine could not exonerate the officer's actions, as only a large brown package was in plain view. Furthermore, the Court held that, while the officer's presence in the backyard constituted a civil trespass, which would not be determinative without further facts showing the degree of expected privacy in such place, the act of reaching into the hole was clearly a physical invasion of the defendant's privacy and a violation of his rights under Silverman v. US 365 US 505, 5 L. Ed. 2d 734, 81 S. Ct. 679 (1961). In response to the appellant's contention, the Court also noted that, as the officer did not terminate his inquisitive activities upon merely noticing the package inside the hole, it was unnecessary to determine whether merely sighting the package would have constituted probable cause.

The Hurst case is analogous to the case at bar on several salient points. In each case a police officer, acting without the authority of a search warrant, saw a package situated in the wall of a building. In neither case were the contents of the packages ascertainable upon this initial viewing. It was necessary rather to reach inside the wall of the building and open the packages and examine the contents be-

fore the officers were able to determine that the contents constituted any sort of incriminating evidence. Also, in each case, the officer probably had established probable cause at some point in the investigation prior to violating the defendant's Fourth Amendment rights, but, as the officers' activities did not stop at that point, the evidence eventually gathered must be excluded.

Somewhat the same position regarding wrapped packages was taken by the Court in Hobson v. US, 226 F 2d 890 (8th Circ. 1955.) There, police officers had surrounded a house and were in the process of demanding entry when a package was hurled out of a second story window. The Court ruled that the suspicious appearance of this package provided no basis for police action, as it was still on protected premises and, because wrapped, revealed no incriminating evidence.

Under the "fruit of the poisonous tree doctrine", as set forth in Silverthorne Lumber Co. vs. U. S. 251 US 385 40 S. Ct. 182 64 L ed. 319 (1920), evidence gathered in violation of a defendant's constitutional rights is not only excluded from use in the course of the trial, but also may not be used indirectly in the prosecution of the defendant. In that case, the government had photographed illegally seized documents prior to returning them to the owner, and then used the

photographs to obtain a subpoena for the same documents. The Supreme Court ruled "the essence of the provision...is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all."

Here, the "fruit of the poisonous tree doctrine" applies to the use of Officer Folding's observations, made during the course of a search without warrant, in the affidavit submitted to the local magistrate in support of the request for the issuance of a search warrant. As shown above, the officer's preliminary, warrantless search of the premises was clearly in violation of the defendant's Fourth Amendment rights, and therefore, the product of that search cannot be used to form the basis of probable cause for issuance of a search warrant.

This very question of observations made during the course of a search later held unreasonable and/or invalid being the basis for a probable cause showing for issuance of a search warrant was decided in McGinnis v. US 227 F. 2d 598 (1st Circ. 1955). There, a federal officer participated in several searches of the premises in question, both without warrant and under authority of invalid warrants. Several days after these searches took place, the agent obtained a federal search warrant by using the observations he had made during the earlier searches as the

substance of his affidavit. The Court held that the warrant so obtained was defective and that all evidence obtained during the resulting search must be suppressed.

Thus, the observations made by Officer Folding during his initial visit to the premises cannot form the basis for the finding of probable cause requisite to the issuance of a search warrant. Nor can the remainder of the information contained in Folding's affidavit, standing without the reinforcement of his personal observations, provide sufficient grounds for a finding of probable cause so as to preserve the validity of the warrant as in James v. US 418 F. 2d 1150 (DC Circ 1969).

At the trial, Judge McKinnon stated that the sufficiency of the warrant and affidavit were dependent, at least in part, on the fact that the affiant stated that he had verified the informant's information by his own personal observation. Officer Folding's actions here cut two ways on the question of the affidavit's sufficiency. To the trial judge, they provided a necessary bolstering of the information supplied by the officer's anonymous informant. However, the fact that the officer felt called upon to go out and personally verify all the information given to him would certainly seem to imply a not so subtle judgment by Folding as to the credibility

of his anonymous informant, a judgment made somewhat more important by the fact that the identity of that informant is known only to the officer. Thus it would seem clear that, had it been based solely on the informant's observations, the affidavit would not have provided sufficient probable cause for the issuance of a search warrant.

The standards for judging an affidavit based upon information received from an unnamed source are set by two U. S. Supreme Court decisions. In Aguilar v. Texas 378 US 108, 12 L. Ed. 2d 2723, 84 S. Ct.1509 (1964), the Court set forth a two part test for such affidavits requiring that "underlying circumstances" tending to show the basis for the informants conclusions and the general credibility of the informant himself be included in the affidavit submitted to the magistrate.

In Wheeler v. Goodman 330 F. Supp. 1356 (WDNC 1971), a statement, very sirilar to the one considered here, concerning past information which had in fact led to convictions was held to be insufficient for issuance of a warrant under the two part test set forth in Aguilar, supra. The Wheeler court went so far as to state that the affidavit should specify by name the convictions to which the informant's information had led in the past. In the present case, no such statement, even by implication, is made. The affiant here

says nothing more than that this informant has at least on one occasion given him information which turned out to be accurate. Under voir dire examination, the affiant did not state what the nature of this information was but did state that it had not led to any arrest for any criminal offense.

The Wheeler Court also held that the warrant failed to meet the Aguilar test because the affidavit failed to set forth circumstances supporting the informant's ability to identify the illicit drugs which he reported seeing to the affiant. In the case at bar, the affidavit states only that "he observed what, he, the source, knew to be marijuana..." Thus, the warrant fails to meet the other half of the Aguilar test. At no point in the affidavit did the affiant state that the informant was in any way knowledgeable concerning drugs; in fact, the affiant stated that the informant had never given him any information which led to a single narcotics arrest.

Furthermore, the affidavit does not state that the informant actually saw any marijuana. It does state that he saw what he "knew to be marijuana wrapped in white plastic bags." However, the affiant testified during the voir dire that the while plastic bags were not transparent and that one could not see what was in the bags without opening them.

Thus, the affidavit at issue here

fails both parts of the Anguilar test in that it fails to provide a sufficient basis for establishing the general credibility of the informant himself and fails to show sufficient basis for the conclusions reached by that informant.

Nor does the affidavit provide sufficient basis for the issuance of a search warrant under the somewhat less formal standards as set forth in US v. Harris, 403 US 573, 29 L. Ed. 2d 723, 91 S. Ct. 2075 (1971). In that case, the Supreme Court upheld the sufficiency of the affidavit concerning information from a confidential informant because the informant's detailed observation of criminal activity and admitted as part thereof his own criminal activities. The Court held that such admissions against the informant's penal interest would provide the underlying circumstances requisite to credit such herearsay evidence. Also in Harris, the informant had clearly had an opportunity to determine for himself the exact nature of the packaged liquid (illegal whiskey) which was being sold, as he was a regular customer. In the case at bar, these factors were not present to bolster the affidavit. The informant here made no admissions of wrong-doing on his own part, nor, apparently, did he have any opportunity to actually ascertain the contents of the bundles wrapped in white plastic which he had seen. Thus, the "ample factual basis for believing the informant,' which was found by the Court to be con-

tained in the Harris affidavit, is absent from the affidavit under examination here.

Seemingly the main precedent utilized by the Court in reaching the Harris holding was Jones v. US 362 US 257, 4 L. Ed. 2d, 697, 80 S. Ct. 725 (1960) in which the informant's "story was corroborated by other sources". This factor and the suspect's reputation for narcotics abuse (he had admitted narcotic use and bore needle marks on his arms) were emphasized by Justice Frankfurter in the majority opinion. Yet, in the case at bar, the sole corroboration for the informant's story is provided by an illegal search conducted by the affiant prior to the issuance of the warrant, and the suspect's reputation for such activities is not nearly so explicit as that in Jones, supra, and is, in fact, based entirely upon hearsay.

Thus, the trial judge was correct in his belief that the validity of the affidavit was dependent upon the observations made by the officer on his initital search of the premises, as the contribution of the informant was insufficient on a number of grounds. However, as the observations of the affiant were made in clear violation of the appellant's rights under the Fourth Amendment to the United States Constitution, they cannot be utilized to establish probable cause for the issuance of a search warrant.

The application of the exclusionary rule to the case at bar can hardly be said to go "beyond the sound limits of the deterrance philosophy". The purpose of the exclusionary rule is to discourage the practice of conducting warrantless searches, such as the preliminary search conducted in this case by Officer Folding. The decision of the North Carolina Court of Appeals essentially informs police officers that they need no longer procure a search warrant before satisfying their curiosity; instead, they may conduct a search without a warrant and only bother with a visit to the magistrate if the preliminary search produces something of interest. This procedure is clearly not that envisioned by the drafters of the fourth amendment.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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APPENDIX TO PETITION

No. 7713SC103 THIRTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
Spring Session 1977

STATE OF NORTH CAROLINA
V From
FRANKLIN PIERCE BARBEE Brunswick

Attorney General Edmisten by Associate Attorney Henry H. Burgwyn for the State.

Frink, Foy & Gainey by E. M. Allen, III for the defendant appellant.

PARKER, Judge.

This is an appeal from judgment imposed upon defendant's conviction for felonious possession of more than one ounce of marijuana. The principal question presented is whether the Court erred in denying defendant's motion to suppress evidence concerning 42.2 pounds of marijuana found in two suitcases on defendant's premises.

We find no error.

Prior to ruling on Defendant's motion to suppress, the Court conducted a voir dire examination at which the State presented evidence to show the following: On 29 February, 1976

defendant owned and operated a self-service gasoline station and grocery store in Yaupon Beach. The business was conducted in a two story cinder block building located on the west side of Highway 133. The bottom story was used for the self-service gas station and grocery store, and the upper story was used for apartments. The entrance to the building was from the front, or east, end of the building which fronted on the highway. On the south side of the building there was a parking lot which was paved with asphalt halfway back on that side of the building, and the remainder of the area on the south side of the building was cleared of all growth. At the rear, or west, end of the building there was an old field, which, beginning a point five or six feet from the rear wall of the building, sloped sharply down from the back of the building into "sort of a bay" which was grown up in high weeds and small trees.

On the afternoon of 29 February, 1976, a confidential informant told Officer Folding, a County Narcotics Officer of the Brunswick County Sheriff's Department, that between 4:00 and 4:30 P. M. that day he had gone to the rear of Defendant's building looking for a restroom. While so engaged, he observed two suitcases in a hole in the cinder block wall at the rear of the building. The front suitcase was partially open. The informant looked in and smelled an odor of what he believed to be marijuana.

The open suitcase contained numerous packages wrapped in white plastic bags. In the informant's opinion these contained marijuana and he referred to them as "bricks" of marijuana. Officer Folding examined his informant as to his knowledge about marijuana.

After receiving the information from his informant, Officer Folding went with two other officers to the old field at the rear of defendant's store building. As he approached the building through the field and when he was 50 to 75 yards away he could see the two suitcases in the hole in the rear wall of the building. As he got closer, he could see "a white plastic thing" sticking out of one of the suitcases, as his informant had told him he had observed. The hole in which the suitcases were lodged had been created when several cinder blocks had been removed from the wall to provide an outlet for the exhaust from the cooler in the store. Officer Folding climbed up the embarkment at the rear of the building. When he was within a couple of feet of the building, he could smell the odor of what he thought to be marijuana. He looked into the partially opened suitcase and saw the plastic bags or packages which his informant had described. The plastic was not transparent and he could not see what was in the package without opening them. He reached into the partially opened suitcase and took out one of the plastic packages, opened it, and saw a green vegetable matter that he thought to be marijuana.

Leaving the other two officers to maintain surveillance over the rear of defendant's store, Officer Folding went before a magistrate to obtain a search warrant authorizing a search of defendant's building for marijuana, swearing to the following facts in the affidavit which he presented to the magistrate to establish probable cause for issuance of the warrant.

"The affiant was contacted by a Confidential and reliable source on 2/27/76 (sic) stating that in the PM hours of 2/29/76, source was on the premises and to the rear of the building, while looking for a rest room saw (2) beige suit cases sitting in an opening in the rear wall of the building. Source went on to say that one of the suit cases was open and he believed what, he, the source knew to be marijuana wrapped in white plastic bags, what, he the source referred to as "bricks" the affiant, then went to the above described building and from the outside rear, observed the two beige suit cases with white plastic from one of the suit cases. The affiant has received information from sources of proven reliability that Franklin Pierce Barbee is involved in illegal Drug traffic and has been for some time. This informant has given affiant information in the past, which through personal obervation and other proven sources has proved to be true and Correct. Due to the reliability of the informant and the reputation of the

suspect, I pray that this search warrant be issued."

On Officer Folding's affidavit, the magistrate issued a search warrant authorizing search of defendant's building for marijuana.

At 7:50 P. M. Officer Folding returned to the store and served the search warrant on the defendant, who was in the store at the time. The officers seized the two suitcases and subsequently determined that they contained 42.2 pounds of marijuana. Search of the interior of the building resulted in the finding of a small amount of marijuana (less than an ounce) wrapped in a paper towel in the freezer compartment of a refrigerator in one of the back rooms. Particles of marijuana were also found beneath the mats in the trunk of defendant's automobile, which was parked next to the building.

In assigning error to the Court's rulings admitting evidence concerning the marijuana found on defendant's premises, defendant contends the search warrant was invalid because it was issued "upon the basis of an illegal and unreasonable prior search conducted without a warrant in violation of the Fourth Amendment." This contention requires that we examine into the lawfulness of the officers' activities prior to issuance of the search warrant and into the connection between those activities and the subsequent issuance

of the warrant.

At the outset we observe that we are not here concerned with a warrantless intrusion by the police into a residential curtilage or, at least insofar as the field behind defendant's building is concerned, into any area with respect to which defendant's reasonable expectations of privacy were protected by the fourth amendment. All actions of privacy were protected by the fourth amendment. All activities of the officers prior to obtaining the search warrant took place outside of defendant's building and in an area to which the public had unrestricted access. Defendant invited the public to patronize his business, and by maintaining a parking lot to the south of the building, he invited the public to come into that area. The spot in the rear wall of the building where the suitcases were found was but a few feet from the parking area, and there was nothing in between to hinder easy access or to indicate that defendant ever attempted in any manner to exclude the public from the area at the rear of his building. When the officers entered and passed through the old field at the rear of defendant's building and while they were still 50 to 75 yards away, they could see the suitcases in plain view. Defendant could hardly have had any reasonable expectation of privacy for items so openly displayed. Although the officers may have been trespassers in the field,

such a trespass did not, of itself, make the search illegal, and the fourth amendment does not extend to open fields, Hester v. United States, 265 U.S. 57, 44 S. Ct. 445 68 L. Ed. 898 (1924)

It may be conceded that when Officer Folding reached into the open suitcase and removed and opened one of the "bricks" of marijuana, he at that point violated defendant's fourth amendment rights. It does not follow, however, that this unwarranted intrusion automatically so tainted all subsequent proceedings as to render the warrant itself and the search made pursuant thereto unlawful. So far as the record reveals, the only information presented to the magistrate to establish probable cause for issuance of the warrant was the information contained in Officer Folding's affidavit. In this no mention was made that the officer had reached inside the suitcase or removed any of its contents. The only mention in the affidavit of anything done by the affiant is that, after receiving the information from his confidential informant, he "then went to the above described building and from the outside rear, observed the two beige suitcases with white plastic from one of the suitcases." In this, as in every case in which a search warrant is sought, the officers were under a duty to use due care to ascertain that the information presented to the magistrate to establish probable cause for the search was accurate. If by any excess of diligence

in that regard Officer Folding at any one point may have violated defendant's fourth amendment rights, nevertheless it does not follow that the exclusionary rule must be automatically applied." If the lawfully obtained information amounts to probable cause and would have justified issuance of the warrant, apart from the tainted information, the evidence seized pursuant to the warrant is admitted." James v. United States, 418 F. 2d 1150, 1152 (D. C. Cir. 1969). We agree with the comment contained in footnote 4 to the opinion in that case, that "(w)hile it is logically possible, by extending the deterrence rationale for the exclusionary rule, to argue as appellant does, that any taint in the police conduct nullified the entire investigatory process so that no warrant can issue, we think this extension goes beyond the sound limits of the deterrence philosophy." We hold that the lawfully obtained information presented to the magistrate in this case was sufficient to support the magistrate's findings of probable cause and that any violation of defendant's fourth amendment rights which may have occurred when Officer Folding, through excess of diligence, reached into the open suitcase, did not so taint the entire proceedings as to require exclusion of the evidence seized pursuant to the warrant. Defendant's first assignment of error is overruled.

(2) Defendant's only remaining assign-

ment of error is directed to the Court's denial of defendant's motion to strike an answer given by one of the State's witnesses during direct examination. The witness, L. D. Jones, Assistant Police Chief of Yaupon Beach, testified that he was present while the search was being conducted and at that time had a conversation with defendant after defendant had been warned of his constitutional rights. Jones testified that during the conversation he asked defendant."Why did you do it?", to which defendant responded, "you have never been broke, have you?" Jones then testified, over defendant's objection, that he responded to defendant's question by saying:

"Yes, I have too. I tried to work out of it through the framework of the law--within the framework of the law."

Defendant moved to strike the testimony of the witness as to this last response which he testified he had given to the defendant, and the denial of this motion is the basis for defendant's second assignment of error.

Defendant contends that the answer which the officer testified he gave to the defendant carried with it the clear implication that, in the opinion of the officer, defendant was not acting within the framework of the law. From this, defendant argues that allowing this evidence showing by implication the opinion of the officer, the providence

of the jury was invaded. If so, the invasion was minimal. In view of the overwhelming evidence of defendant's guilt, the jury could hardly have been influenced because one of the arresting officers testified that he made a statement to the defendant at the time of the arrest which implied that the officer thought that defendant was guilty. In the majority of the criminal cases, the very act of making the arrest carries with it the same implication. We find no prejudicial error in the court's denial of the motion to strike.

In defendant's trial and in the judgment appealed from we find

No error.

Judges MORRIS AND CLARK concur.

Filed September 21, 1977

No. 62PC THIRTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
Fall Term - 1977

****

STATE OF NORTH CAROLINA
VS From
FRANKLIN P. BARBEE Brunswick
(7713SC103)

JUDGMENT DISMISSING APPEAL
ON MOTION OF ATTORNEY GENERAL
AND DENYING PETITION FOR
DISCRETIONARY REVIEW

****

Attorney General Edmisten by Associate Attorney Henry H. Burgwyn for the State.

Frink, Foy & Gainey by E. M. Allen, III for the defendant appellant

This matter coming on to be considered upon Defendant's notice of appeal from the North Carolina Court of Appeals, pursuant to G. S. 7A-30, upon the Attorney General's motion to dismiss the appeal for lack of a substantial constitutional question, and upon Defendant's Petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G S. 7A-31; upon consideration whereof, it is adjudged by the Court in conference this 1st day of

November, 1977, that the motion to dismiss the appeal be allowed, that the petition for discretionary review be denied, and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that the defendant do pay the costs incurred, to wit: the sum of NINETEEN AND NO/100 ($19.00) DOLLARS and execution issue therefor. Petition for stay of execution of judgment was also denied.

Issued under my hand and the seal of the Supreme Court this 2nd day of November, 1977.

/s/ John R. Morgan
John R. Morgan
Clerk of the Supreme Court
of North Carolina